SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

WAGNER ELECTRIC COMPANY,
Appellant,

v.

LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis.

No. 738.

MOTION TO DISMISS OR AFFIRM

and

BRIEF IN BEHALF OF LAMAR LYNDON, APPELLEE.

JOHN D. RIPPEY,
LAWRENCE C. KINGSLAND,
Counsel for Lamar Lyndon, Appellee.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 913.

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MOTION TO DISMISS OR AFFIRM.

Now comes Lamar Lyndon, one of the appellees in the above-entitled cause, and moves the Court to dismiss the appeal in this case, or to affirm the decree of United States Circuit Court of Appeals for the Eighth Circuit, for the following reasons, to wit:

1. That it appears from the record that there is no constitutional question involved, and that therefore the decision and judgment of the United States Circuit Court of Appeals is final.

2. That it is manifest from the record that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

and it is manifest that the appeal was taken for delay only.

Wherefore, appellee prays that the appeal be dismissed, or that the judgment of the Circuit Court of Appeals for the Eighth Circuit be affirmed with just damages to appellee for his delay.

John D. Rippey,
Lawrence C. Kingsland,
Counsel for Lamar Lyndon, Appellee.

NOTICE.

Please take notice that on the 30th day of April, 1923, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the brief of appellee in support of this motion.

John D. Rippey,
Lawrence C. Kingsland,
Counsel for Lamar Lyndon, Appellee.

BRIEF IN BEHALF OF APPELLEE, LAMAR LYNDON.

STATEMENT.

The present suit arose out of a controversy that originated in the state courts of Missouri.

On May 10, 1917, appellee Lamar Lyndon instituted a suit in the Circuit Court of the City of St. Louis, Missouri, against the appellant Wagner Electric Manufacturing Company. The state court action was founded on a contract and was for the recovery of certain royalties due the appellee Lyndon from the appellant Wagner Company. The Wagner Company was duly served, answered and the cause came on for trial before the Court sitting with a jury, on December 4, 1917. Evidence was introduced by both parties, and, at the close of all the evidence, the Court instructed the jury to find a verdict in favor of appellee Lyndon; the jury so found and the Court entered a judgment upon said verdict. The appellant Wagner Company thereupon filed its motion for a new trial. The motion for new trial was overruled and the Wagner Company thereupon appealed to the Supreme Court of Missouri. The appeal was duly assigned to Division No. 1 of the

Supreme Court of Missouri, comprising four judges as provided by the Constitution of Missouri in the Amendment of 1890, reading, in part, as follows:

> "Section 1. **Number of Judges—Divisions of Court—Business Divided—Quorum.**—The Supreme Court shall consist of seven judges, and * * * shall be divided into two divisions, as follows: One division to consist of four judges of the court and to be known as Division No. 1. * * * A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court."

Thereafter, on January 21, 1920, the appeal was argued and submitted to the Court. Three of the Judges of Division No. 1 heard the argument, and full printed arguments were filed by both parties. Thereafter, on July 19, 1920, the Supreme Court of Missouri entered its judgment affirming the judgment of the trial court, and filed an opinion which was concurred in by the full court, said opinion being signed by A. M. Woodson, J., who was a member of the court at the day of the argument, but who was not present on the Bench on the date of the argument. After the judgment of the Supreme Court of Missouri had been entered and the opinion filed, the Wagner Electric Company filed its motion for a re-

hearing in the Supreme Court of Missouri, which motion was overruled. Thereafter, the Wagner Company filed a motion to transfer the cause to the Court en banc, which motion was overruled.

The Wagner Company thereupon filed in this Court its petition for a writ of certiorari to review said judgment of affirmance by the Supreme Court of Missouri. The grounds for the petition for writ of certiorari included the same matters now presented on this appeal. The petition for writ of certiorari was denied by this Court April 11, 1921 (Wagner v. Lyndon, 256 U. S. 690). Thereafter, the mandate of the Supreme Court of Missouri having passed to the Circuit Court of the City of St. Louis, Missouri, the Circuit Court of the City of St. Louis issued its execution to the Sheriff of the City of St. Louis, and the Sheriff made a levy under said execution. Thereupon, the Wagner Company filed a bill in equity against Lamar Lyndon in the United States District Court at St. Louis, seeking an injunction preventing Lyndon from proceeding with said execution. Application for preliminary injunction in said suit was heard by the District Court and was denied. The Wagner Company thereupon paid the judgment, interest and costs to the Sheriff of the City of St. Louis in the sum of fifteen thousand fifteen dollars and twenty-nine cents ($15,015.29). After said sum had been paid to the Sheriff of the City of St. Louis, the

appellant instituted the present suit in the District Court of the United States for the Eastern Division, Eastern District of Missouri, against the appellee, Lamar Lyndon, and the Sheriff of the City of St. Louis, alleging among other matters that it, the Wagner Company, had been deprived of its property without due process of law and denied equal protection of the law, basing these allegations on the action of the Circuit Court of the City of St. Louis, Missouri, in directing a verdict for Lamar Lyndon, and on the participation of Judge Woodson of the Supreme Court of Missouri in the decision of the cause by the Supreme Court of Missouri, when he had not heard oral argument of the cause.

Appellant's bill of complaint asks for an injunction restraining the Sheriff of the City of St. Louis from paying the money over to appellee Lamar Lyndon, and for a recovery of the fund from the Sheriff. Motions to dismiss the bill of complaint were filed by the Sheriff of the City of St. Louis and by Lamar Lyndon. Thereafter, the District Court dismissed the bill of complaint on the ground that there were no facts alleged entitling the plaintiff to maintain the suit. The opinion of the District Court dismissing the bill of complaint appears in the present record at page 27 et seq. The Wagner Company appealed from the order dismissing the bill of complaint to the

United States Circuit Court of Appeals for the Eighth Circuit.

The appeal came on to be heard before the United States Circuit Court of Appeals for the Eighth Circuit, and said court filed an opinion and entered its decree affirming the decree of the District Court. The opinion of the Court of Appeals for the Eighth Circuit appears on pages 39 et seq. of this record. The Wagner Company thereupon filed a petition for writ of certiorari in this court, and at the same time took the present appeal. This Court denied the application for writ of certiorari February 26, 1923.

On this state of the record the appellee Lamar Lyndon now moves this Court to dismiss the appeal for the reason that it does not involve a federal question, or to affirm the judgment of the Circuit Court of Appeals for the Eighth Circuit for the reason that the questions presented are frivolous and that the appeal is taken for delay only.

It is apparent from the assignment of errors (Rec., p. 48) that the appellant contends:

(1) That direction of a verdict in favor of Lamar Lyndon in the state trial court deprived appellant of its rights under the Fourteenth Amendment of the Constitution of the United States; and

(2) That the action of the Supreme Court of the State of Missouri in causing Judge Woodson of that

court, and who was not present at the oral argument to write an opinion, in which all the judges concurred was a denial of due process.

(3) That the failure of the Supreme Court of Missouri to transfer to Court en Banc was a denial to appellant of due process of law.

BRIEF AND ARGUMENT.

The Record Shows No Denial of Trial by Jury.

The appellant contends that the action of the state trial court in directing a verdict for Lyndon violated the due-process clause of the Constitution of the United States. In the first place, the trial in the state court was a jury trial in conformity with the practice and procedure as approved by the Supreme Court of Missouri. It was for the state trial court to determine as a matter of general law the construction of the contract sued on and to determine the question as to whether the undisputed evidence showed, as a matter of law, liability under the contract.

A federal court will not go into the question as to whether the law as applied by the trial court was right or wrong. The contention of appellant, therefore, that a judgment was rendered without sufficient proof is not a federal question (*United States v. Norsch*, 42 Fed. 417).

This Court, in *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 674, has expressly held that even an erroneous direction of a verdict by the trial court cannot be relied upon as raising a federal question under the Constitution of the United States.

Denial of Trial By Jury Not Denial of Due Process.

Moreover, even if the action of the trial court were construed to be a denial of trial by jury, such a denial would not amount to denial of due process. By a long line of decisions of this Court, and other federal tribunals, it has been held that a trial by jury in suits at common law in the state courts is not a privilege or immunity of national citizenship that the states are forbidden by the Fourteenth Amendment to abridge.

> Walker v. Sauvient, 92 U. S. 90;
> Frank v. Mangum, 237 U. S. 309;
> Gibson v. Billingham, 213 Fed. 488;
> Friedemann v. United States, 227 Fed. 732;
> Raymond v. Chicago, 233 Fed. 289.

In the case of *Walker v. Sauvient, supra,* Chief Justice Waite said:

> "A trial by jury in suits at common law pending in the state court is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge. * * * Here the state court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

The Supreme Court, in the case of *Frank v. Mangum, supra*, said:

> "Repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. * * * The trial by jury is not essential to it, either in civil causes (Walker v. Sauvient, 92 U. S. 90) or in criminal cases."

It follows, therefore, that since the course of procedure followed by the Circuit Court of the City of St. Louis has been approved as the law of the state by the Supreme Court of Missouri, it is a question settled beyond interference by a federal tribunal.

Oral Hearing Not Element of Due Process.

Likewise, the fact that one of the Judges of the Supreme Court of Missouri who chanced to write the opinion of the Court failed to hear the oral argument does not involve a federal question.

Under the provisions of the State Constitution quoted (p. 6, *ante*) a majority of the court constitutes a quorum of the court, and the decision of the Su-

preme Court of Missouri was a unanimous decision of the court. No denial of due process or equal protection of the law under the Constitution was in anywise involved by the action of the Court, which resulted in the opinion being written by Judge Woodson.

In *Thompson on Trials*, paragraph 920, it is said:

> "It is conceived that a distinction must be taken between the right to *appear* and *defend* by counsel and the right to be *heard in argument* by counsel. * * * Clearly, it is within the power of the court, in a civil case, to dispense with this aid or help, where it is not necessary."

In the case of *Wall v. Old Colony Trust Co.*, 177 Mass., *l. c.* 277, the Court said:

> "We should hesitate to say that there is anything in the Constitution, either of this state or of the United States, which expressly or implicitly prevents a court of last resort from prescribing absolutely by rule that arguments upon questions of law, brought from an inferious tribunal, shall be presented only in writing or in print."

In the case of *Golden Gate Lumber Co. v. Sharbacker*, 105 Cal. 114, the Court said:

> "Upon the conclusion of the evidence the court declined to hear an oral argument of the case, but gave the attorneys the privilege of filing briefs. Appellant insists that he had a legal

right to orally argue the case to the court. We have no doubt that the court, in the exercise of its discretion, had the right to decline to hear oral argument."

Certainly, the Supreme Court of Missouri, having reached a unanimous decision, had the full right without abridgement of any constitutional right of the appellant to assign to Judge Woodson the duty of preparing the opinion in the case. The Supreme Court of Missouri, in *Chovin v. Wagner*, 18 Mo. 531, has held that the reasons stated in an opinion are no part of the decision of the Court.

Moreover, it will be remembered that this Court had presented to it by appellant these same questions in the application for writ of *certiorari* from the state court (*Wagner v. Lyndon*, 256 U. S. 690). This was the only method for the review of the questions that were present in the state court record that was open to appellant. The effect of the denial of the writ by this Court was to give finality to the state court judgment, and the present suit is merely an attempt to attack collaterally a final state court judgment upon grounds present in the former record.

The Appeal is Frivolous and Manifestly Taken For Delay Only.

Aside from the question of jurisdiction, it is manifest that the bill of complaint is entirely without equity. The bill of complaint seeks an injunction

against the Sheriff of the City of St. Louis from paying over to appellee Lamar Lyndon funds in his hands made on an execution issued out of the state court, and seeks to have declared a trust in the funds for the benefit of the appellant.

The basic distinction between a case in which federal courts have upheld jurisdiction to enjoin the enforcement of state court judgments and cases in which such jurisdiction has been refused, is that where the appeal is predicated on independent equities arising outside of the record of the state court and involving fraud, accident or mistake the bill may be sustained; otherwise where the attack on the state court judgment is predicated upon alleged errors or irregularities inherent in the record of the state court, jurisdiction by the federal court has universally been refused.

> Central Land Co. v. Laidley, 159 U. S. 103;
> Surety Co. v. Bank, 120 Fed. 593;
> United States v. Morris, 262 Fed. 514;
> Little Rock Ry. Co. v. Burke, 66 Fed. 83.

In the case of *Central Land Co. v. Laidley*, 159 U. S. 103, Mr. Justice Gray said:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive

the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States" (citing Walver v. Sauvient, 92 U. S. 90; Head v. Amoskeag Mfg. Co., 113 U. S. 9; Morley v. Lake Shore R. R., 146 U. S. 162; Bergemann v. Backer, 157 U. S. 655).

In *Surety Co. v. Bank*, 120 Fed. 383, in speaking for the United States Circuit Court of Appeals, Judge Sanborn said:

> "The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant, and (5) the absence of any adequate remedy at law."

In the case of *United States v. Morris*, 262 Fed. 514, Judge Lewis held that in a case where funds were in the hands of a sheriff and it was sought to declare a trust in the funds for the benefit of a plaintiff, the Court was without power to entertain the suit against the Sheriff to require him to disregard the orders of the state court.

In *Little Rock Ry. Co. v. Burke*, 66 Fed. 83, Judge Thayer held that federal courts have no jurisdiction

of a suit to set aside a decree of a state court on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal or bill of review in a court which made the decree is the proper and sufficient remedy.

There is nothing in any decision of this Court, so far as counsel has been able to discover, which would, even remotely, justify the maintenance of the bill of complaint on any theory. There is certainly nothing in the case of *Simon v. Southern Ry. Co.*, 236 U. S. 115, relied upon below by appellant, to sustain the equity of the bill. This Court there said:

> "Where a state court had jurisdiction of the person and subject matter a judgment rendered in the suit would be binding on all the parties until reversed, and there would, therefore, usually be no equity in a bill in a federal court seeking to enjoin against the enforcement of a state court judgment thus binding between the parties."

Wells Fargo & Co. v. Taylor, 254 U. S. 183, another case relied upon by the appellant below, was a case in which the Wells Fargo Company had no opportunity to present the question that was made the basis of an independent suit in equity to enjoin the enforcement of a judgment obtained in a state court by Taylor. This Court expressly said:

> "The judgment (state court judgment) was obtained in an action to which that company was not a party and wherein it could not be heard."

Counsel submits that it is so clear and beyond question that the only cases in which a federal court has ever assumed jurisdiction to enjoin the enforcement of a state court judgment are those in which the suit is based on facts and matters that were not involved in the state court record, that contentions to the contrary are "so frivolous as not to need further argument."

The decisions, both of the District Court (Rec., p. 27) and of the Court of Appeals (Rec., p. 29) are so clearly right that an attempt by the present appeal to resubmit the questions for decision by this Court is manifestly for delay only.

On the Question of Damages For Delay.

It appears from the decisions of this Court that, under Sections 1010 and 1012, U. S. Revised Statutes, this Court has the power to assess just damages either upon the dismissal of an appeal or the affirmance of a judgment where the appeal raises unsubstantial or frivolous questions.

In the case of *Deming v. Carlisle Packing Co.*, 226 U. S. 102, damages were allowed because the asserted federal right was of an unsubstantial and frivolous character.

We respectfully submit that in this case the record justifies an application of the statute. The amount in controversy is fifteen thousand fifteen dollars and

twenty-nine cents ($15,015.29). An award of damages for the delay of ten (10) per cent of this amount apparently would be in conformity with the established practice of this Court.

Conclusion.

In view of the foregoing we respectfully urge that the appeal either be dismissed or that the judgment of the Circuit Court of Appeals for the Eighth Circuit be affirmed, and that the appellant be awarded as damages ten (10) *per cent* of the sum in controversy.

Respectfully submitted,

JOHN D. RIPPEY,
LAWRENCE C. KINGSLAND,
Counsel for Appellee, Lamar Lyndon.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

WAGNER ELECTRIC MANUFACTURING COMPANY, a Corporation,
Petitioner,
v.
LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis,
Respondents.

No. 738

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CHARLES A. HOUTS,
ALBERT BLAIR,
THOMAS J. COLE,
Attorneys for Petitioner.

J. W. Steele & Co., Printers, 101-103 S. Seventh St., St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

WAGNER ELECTRIC MANUFACTURING COMPANY, a Corporation,
Petitioner,
v.
LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis,
Respondents.
No.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioner, Wagner Electric Manufacturing Company, a corporation, prays for a writ of certiorari to review a final judgment of the United States Circuit Court of Appeals for the Eighth Judicial Circuit in the case of Wagner Electric Manufacturing Company, a corporation, appellant, versus Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, appellees, which case went to the United States Circuit Court of Appeals for the Eighth Judicial Circuit on appeal from a judgment of the District Court

of the United States for the Eastern Division of the Eastern Judicial District of Missouri. The judgment of the last mentioned court, appealed from as aforesaid, dismissed appellant's (your petitioners') petition upon the ground that it did not state a case justifying the relief prayed for.

The facts to be considered by the Court, therefore, are those set out in the petition and the accompanying exhibit to it. They are as follows: On the 2nd of March, 1912, the defendant Lyndon was the owner of a patent upon a device for propelling and charging electric vehicles. This patent had been issued in 1906. On the date first mentioned (March 2, 1912) he entered into an option contract with petitioner, Wagner Electric Manufacturing Company, granting it the right to elect between purchasing the patent outright, or to manufacture and sell the device under an exclusive license. For this right of election the Wagner Company paid him $1,750.00. By the terms of the contract, if the Wagner Company elected to purchase the machine it was to pay a definite fixed price; if it elected to operate under a license it was to pay a royalty upon each machine sold, but the total annual royalties were not to be less than $3,000.00 a year. At the time the contract was made no machines embodying the features described in the patent had ever been built. As soon as the option contract was signed, the Wagner Company proceeded to build an experimental machine, which proved to be a failure. It thereupon attempted to abandon its contract altogether. This attempted abandonment took place approximately six months after the making of the contract. It never built any machine other than the experimental one; it never sold or offered for sale

any of said machines, and never, at any time, exercised, or attempted to exercise, any rights under the patent.

In this situation, some five years afterwards (May 10, 1917), Lyndon brought a suit in the Circuit Court of the City of St. Louis, Missouri, for the minimum royalties of $3,000.00 a year mentioned in the contract. In this suit he specifically alleged, and based his right to these royalties upon the claim, that the Wagner Company had exercised its right of election granted it by the contract, and had elected to avail itself of the privilege to manufacture and sell said machines upon the exclusive license basis.

To the petition thus filed by him, the Wagner Company, in due time, answered, denying that it had elected to avail itself of the exclusive license privilege granted by the contract, asserting, on the contrary, that it had abandoned and withdrawn altogether from the contract between it and Lyndon.

The case in due course came on for trial in the Circuit Court of the City of St. Louis, before Judge Karl Kimmel and a jury. Lyndon was the only witness on his side of the case. Upon the question, whether or not the Wagner Company had elected to avail itself of the exclusive license privilege of the contract, Lyndon testified as follows:

> Mr. Kingsland (continuing): Q. Did the company avail itself of the privilege of purchasing the patent outright, or did they elect to proceed under the patent as a licensee?
>
> Mr. Honts: I object to that as immaterial.
>
> The Court: That is one of the things whether they availed themselves of the privilege——

Mr. Kingsland: I will confine the question, therefore, as to whether the defendant company availed themselves of the right to purchase outright.

The Court (addressing witness): You may answer that question.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted and still continues to except.

The Witness: A. I never understood that it was the intention of the company to purchase outright.

Mr. Houts: I object to that and move that it be stricken out.

The Court: The objection is sustained, and the motion to strike out is sustained. (Addressing witness): You are asked whether or not they purchased this patent outright; you can answer by saying "yes" or "no." A. I have never been sure, your Honor; they had the option of doing two things.

The Court: Q. Did you ever get $24,000 for this patent? A. Never; they never purchased it.

The Court: They never purchased it? A. No.

He produced no other evidence upon this question, and your Honors will observe from his testimony, as quoted above, Lyndon went no further than to say that the Wagner Company, although it "had the option of doing two things" had **not** elected to **purchase.** He did not pretend to say that the Wagner Company had, as charged in his petition, elected to operate under an exclusive license.

For the Wagner Company, defendant in that suit, Mr. W. A. Layman, its president, was the only witness.

He testified that the Wagner Company had at no time elected to operate under an exclusive license nor had it elected to purchase the patent.

There was no other testimony on either side of the case upon this question.

At the conclusion of all the evidence defendant, Wagner Company, asked the Court to submit to the jury the question whether or not the Wagner Company had made an election to operate under an exclusive license as claimed in the petition by the following offered instruction:

> "The Court instructs the jury that under the contract the defendant was given the right to choose between purchasing the patent outright or to operate under an exclusive license thereunder. If you believe and find from the evidence that the defendant did not elect either to purchase outright or to operate under an exclusive license, then your finding must be for the defendant."

This the Court refused to do, and on the contrary gave a peremptory instruction to the jury to find for the plaintiff; the instruction given being as follows:

> "The Court instructs the jury that under the contract sued on, defendant became bound to pay plaintiff for the third year, mentioned therein, namely, from March 2, 1914, to March 2, 1915, and each year thereafter, the sum of three thousand dollars ($3,000.00) per year as royalty for the enjoyment of the rights under the patent mentioned in the contract, said royalty to be paid in advance, one-half in January and the balance in July of each year; that under the contract defendant's obliga-

tion to pay the royalty was absolute, unless at the expiration of two years from the date of the contract, namely, two years from March 2, 1912, defendant terminated the agreement in compliance with its terms.

You are further instructed that the defendant did not terminate the contract in the manner and within the time specified therein. You will return your verdict, therefore, for plaintiff in the sum of ten thousand five hundred dollars ($10,500.00), with interest from the dates each installment became due, as set out in the plaintiff's petition, to-wit:

Interest at the rate of six per cent per annum on the following amounts:

On $1500 from January 1, 1914, to date;
On $1500 from July 1, 1914, to date;
On $1500 from January 1, 1915, to date;
On $1500 from July 1, 1915, to date;
On $1500 from January 1, 1916, to date;
On $1500 from July 1, 1916, to date;
On $1500 from January 1, 1917, to date."

Under this instruction the jury returned a verdict against the Wagner Electric Manufacturing Company for twelve thousand and twenty-nine dollars and fifty cents ($12,029.50).

From this judgment an appeal was taken to the Supreme Court of the State of Missouri. That court consists of two divisions, namely, Division No. 1 and Division No. 2. The case was assigned to Division No. 1, consisting of four judges.

Pursuant to the Constitution and laws of Missouri,

it was set down for oral argument before the Judges of that division. When it came on to be argued, Judge Woodson, a member of Division No. 1, was absent. It was duly argued before the other three Judges of the Division. Thereafter an opinion was handed down by Division No. 1 affirming the judgment of the Circuit Court of the City of St. Louis. The opinion contained no reference whatever to the claim of the Wagner Company that no evidence had been introduced in the trial court of the Wagner Company's having elected to operate under an exclusive license, which, under the provision of the contract, and under the allegations of the pleadings, was a prerequisite to any obligation to pay royalties. This opinion was written by Judge Woodson, who, as stated above, was absent at the time of the oral argument before Division No. 1, and who participated in the decision without ever having accorded the Wagner Company the right of oral argument before him, a right which the Constitution of Missouri accords to every litigant.

Upon the filing of this opinion the Wagner Company filed a motion for a rehearing, and also a motion to have the cause transferred to the court en banc, the latter motion being based upon the ground that Judge Woodson's participation in the decision of the case, without the Wagner Company having been accorded the right of oral argument before him was a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States, and that thereby a Federal question was presented, which, under the Constitution of the State of Missouri, required that the cause be transferred to the court en banc for reargument before the entire court. Both of these motions were denied.

The Wagner Company then, unsuccessfully, petitioned the United States Supreme Court for a writ of certiorari, and when its petition was denied, Lyndon, through his attorneys, then started to enforce the judgment of the Circuit Court of the City of St. Louis, by causing an execution to issue against the property of the Wagner Company. Under this execution valuable property was levied upon and advertised for sale, to avoid which the Wagner Company, under protest, paid to the Sheriff of the City of St. Louis, Missouri, the sum of fifteen thousand and fifteen dollars and twenty-nine cents ($15,015.29), representing the amount of the judgment, interest and costs.

While this money was still in the hands of the Sheriff of the City of St. Louis, Missouri, the Wagner Company instituted this suit in the United States District Court to have this fund declared a trust fund in the hands of the Sheriff, to which the Wagner Company is entitled, because wrongfully coerced from it in execution of a void judgment against the Wagner Company. It claims that the judgment obtained by Lyndon against it is void, and its enforcement constitutes a taking of its property without due process of law, and without its having received the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The District Court of the United States as aforesaid rendered a judgment dismissing appellant petition upon the ground that such petition did not state a cause justifying the relief asked for. An appeal from this judgment or decree was duly taken to the United States Circuit Court of Appeals for the Eighth Circuit, wherein an opinion was written by District Judge Trieber

(the late Circuit Judge Carland and District Judge Munger sitting with him), 282 Fed. 219. The decree of the District Court was affirmed by the Circuit Court of Appeals, and it is your petitioner's contention that said Circuit Court of Appeals erred as follows:

1. Said Circuit Court of Appeals erred in holding in effect that the action of the Circuit Court of the City of St. Louis, in giving the peremptory instruction hereinabove discussed, could constitute any more than an error in the application of the law, at the trial, and that the United States Circuit Court of Appeals could grant no relief.

2. The Circuit Court of Appeals erred in holding that the giving of a peremptory instruction, directing a verdict in favor of plaintiff, when there is no evidence to support such verdict, does not deprive defendant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals erred in holding that your petitioner's contention that it had been deprived of its property without due process of law, in that the opinion of the Supreme Court of Missouri was prepared by a member of the court who was not present at the oral argument, was without merit.

4. The Circuit Court of Appeals erred in ignoring the point urged by your petitioner, that the refusal of Division No. 1 of the Supreme Court of Missouri to transfer the case to the court en banc for reargument, after the Wagner Company had asserted that a Federal question had been brought into the case by the participation in the decision of a Judge who was absent

from the oral argument, constituted a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The Consitution of Missouri plainly provides that when a Federal question appears in a case which is being heard in Division, that such case should be transferred to the court en banc.

Your petitioner states that the above questions are questions of supreme importance, because they involve in their final analysis a determination as to how far, under the forms of law, arbitrary power may be exercised by not mere legislative or executive officers, but those clothed with judicial power.

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, commanding that court to certify the cause of Wagner Electric Manufacturing Company, appellant, v. Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, appellees, to this court for review and determination, as provided by law, and that your petitioner may have such other and further relief in the premises as to this court may seem proper.

CHARLES A. HOUTS,
Attorney for Petitioner.

SUGGESTIONS IN SUPPORT OF PETITION.

Foreword.

Petitioner, Wagner Electric Manufacturing Company, is asking the Court to issue its writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit. Petitioner has already prosecuted an appeal to this Court from the judgment referred to. This double method of invoking the jurisdiction of this Court has been resorted to, because of some doubt as to which of the two methods is the proper one to be employed under the circumstances.

The Case Presented.

The case presents two questions of vital importance arising under the "due process" and "equal protection" clauses of the Constitution of the United States.

The first of these questions is:

> **Can a state court arbitrarily direct a jury to return a verdict in favor of a plaintiff without submitting to the jury for determination the principal question raised by the pleadings, without a determination of which no judgment could be rendered against the defendant?**

The second:

> **Upon an appeal being taken from such a judgment, can a judge of the Supreme Court of the State of Missouri (whose Constitution guarantees to an appellant a hearing before the Supreme**

Court) participate in the decision of the case and write the opinion of the court affirming the judgment of the trial court, without having been present at the hearing in that court?

The two questions just stated were presented to the United States District Court for the Eastern Division of Missouri by petitioner's petition filed in that court, wherein petitioner sought relief in equity against a judgment of the Circuit Court of the City of St. Louis, Missouri, which had been affirmed on appeal by the Supreme Court of the State of Missouri. The defendants named in that petition filed motions to dismiss, in the nature of demurrers to the petition, conformable to the present equity practice. The District Court sustained the motions to dismiss, and from that judgment an appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the judgment of dismissal was affirmed.

In appraising the correctness of the judgment of the District Court and of the Circuit Court of Appeals, the facts to be considered, therefore, are those set out in the petition and the accompanying exhibit to it. They are as follows:

On the 2nd of March, 1912, the defendant Lyndon was the owner of a patent upon a device for propelling and charging electric vehicles. This patent had been issued in 1906. On the date first mentioned (March 2, 1912), he entered into an option contract with petitioner, Wagner Electric Manufacturing Company, granting it the right to elect between purchasing the patent outright or to manufacture and sell the device under an exclusive license. For this right of election

the Wagner Company paid him $1,750.00. By the terms of the contract, if the Wagner Company elected to purchase the machine it was to pay a definite fixed price; if it elected to operate under a license it was to pay a royalty upon each machine sold, but the total annual royalties were not to be less than $3,000.00 a year. At the time the contract was made no machines embodying the features described in the patent had ever been built. As soon as the option contract was signed, the Wagner Company proceeded to build an experimental machine, which proved to be a failure. It thereupon attempted to abandon its contract altogether. This attempted abandonment took place approximately six months after the making of the contract. It never built any machine other than the experimental one; it never sold or offered for sale any of said machines, and never, at any time, exercised, or attempted to exercise, any rights under the patent.

In this situation, some five years afterwards (May 10, 1917), Lyndon brought a suit in the Circuit Court of the City of St. Louis, Missouri, for the minimum royalties of $3,000.00 a year mentioned in the contract. **In this suit he specifically alleged and based his right to these royalties upon the claim that the Wagner Company had exercised its right of election granted it by the contract, and had elected to avail itself of the privilege to manufacture and sell said machines upon the exclusive license basis.**

To the petition thus filed by him, the Wagner Company, in due time, answered, denying that it had elected to avail itself of the exclusive license privilege granted by the contract, asserting, on the contrary,

that it had abandoned and withdrawn altogether from the contract between it and Lyndon.

The case in due course came on for trial in the Circuit Court of the City of St. Louis before Judge Karl Kimmel and a jury. Lyndon was the only witness on his side of the case. Upon the question whether or not the Wagner Company had elected to avail itself of the exclusive license privilege of the contract, Lyndon testified as follows:

> Mr. Kingsland (continuing): Q. Did the company avail itself of the privilege of purchasing the patent outright, or did they elect to proceed under the patent as a licensee?
>
> Mr. Houts: I object to that as immaterial.
>
> The Court: That is one of the things, whether they availed themselves of the privilege——
>
> Mr. Kingsland: I will confine the question, therefore, as to whether the defendant company availed themselves of the right to purchase outright.
>
> The Court (addressing witness): You may answer that question.
>
> To which ruling of the Court the defendant, by its counsel, then and there duly excepted and still continues to except.
>
> The Witness: A. I never understood that it was the intention of the company to purchase outright.
>
> Mr. Houts: I object to that and move that it be stricken out.
>
> The Court: The objection is sustained, and the motion to strike out is sustained. (Addressing witness) You are asked whether or not they purchased this patent outright; you can answer by

saying "yes" or "no." A. I have never been sure, your Honor; they had the option of doing two things.

The Court: Q. Did you ever get $24,000 for this patent? A. Never; they never purchased it.

The Court: They never purchased it? A. No. (Transcript of Record, p. 18.)

He produced no other evidence upon this question, and your Honors will observe from his testimony, as quoted above, Lyndon went no further than to say that the Wagner Company, although it "had the option of doing two things" had **not** elected to **purchase.** He did not pretend to say that the Wagner Company had, as charged in his petition, elected to operate under an exclusive license.

For the Wagner Company, defendant in that suit, Mr. W. A. Layman, its president, was the only witness. (Transcript, p. 19.) He testified that the Wagner Company had, at no time, elected to operate under an exclusive license nor had it elected to operate under an exclusive license nor had it elected to purchase the patent. (Transcript, p. 21.)

There was no other testimony on either side of the case upon this question.

At the conclusion of all the evidence, defendant, Wagner Company, asked the Court to submit to the jury the question, whether or not the Wagner Company had made an election to operate under an exclusive license as claimed in the petition by the following offered instruction (Transcript, p. 7):

"The Court instructs the jury that under the contract the defendant was given the right to

choose between purchasing the patent outright, or to operate under an exclusive license thereunder. If you believe and find from the evidence that the defendant did not elect either to purchase outright or to operate under an exclusive license, then your finding must be for the defendant."

This the Court refused to do, and on the contrary gave a peremptory instruction to the jury to find for the plaintiff; the instruction given being as follows:

"The Court instructs the jury that under the contract sued on, defendant became bound to pay plaintiff for the third year, mentioned therein, namely, from March 2, 1914, to March 2, 1915, and each year thereafter, the sum of three thousand dollars ($3,000.00) per year as royalty for the enjoyment of the rights under the patent mentioned in the contract, said royalty to be paid in advance, one-half in January and the balance in July of each year; that under the contract defendant's obligation to pay the royalty was absolute, unless at the expiration of two years from the date of the contract, namely, two years from March 2, 1912, defendant terminated the agreement in compliance with its terms.

You are further instructed that the defendant did not terminate the contract in the manner and within the time specified therein. You will return your verdict, therefore, for plaintiff in the sum of ten thousand five hundred dollars ($10,500.00), with interest from the dates each installment became due, as set out in the plaintiff's petition, to-wit:

Interest at the rate of six per cent per annum on the following amounts:

On $1500 from January 1, 1914, to date;
On $1500 from July 1, 1914, to date;
On $1500 from January 1, 1915, to date;
On $15000 from July 1, 1915, to date;
On $1500 from January 1, 1916, to date;
On $1500 from July 1, 1916, to date;
On $1500 from January 1, 1917, to date."

Under this instruction the jury returned a verdict against the Wagner Electric Manufacturing Company for twelve thousand and twenty-nine dollars and fifty cents ($12,029.50).

From this judgment an appeal was taken to the Supreme Court of the State of Missouri. That court consists of two divisions, namely, Division No. 1 and Division No. 2. The case was assigned to Division No. 1, consisting of four judges.

Pursuant to the Constitution and Laws of Missouri, it was set down for oral argument before the Judges of that division. When it came on to be argued Judge Woodson, a member of Division No. 1, was absent. It was duly argued before the other three Judges of the division. Thereafter an opinion was handed down by Division No. 1 affirming the judgment of the Circuit Court of the City of St. Louis. The opinion contained no reference whatever to the claim of the Wagner Company that no evidence had been introduced in the trial court of the Wagner Company's having elected to operate under an exclusive license, which, under the provision of the contract, and under the allegations of the pleadings, was a prerequisite to any obligation to

pay royalties. This opinion was written by Judge Woodson, who, as stated above, was absent at the time of the oral argument before Division No. 1, and who participated in the decision without ever having accorded the Wagner Company the right of oral argument before him, a right which the Constitution of Missouri accords to every litigant.

Upon the filing of this opinion the Wagner Company filed a motion for a rehearing, and also a motion to have the cause transferred to the court en banc, the latter motion being based upon the ground that Judge Woodson's participation in the decision of the case, without the Wagner Company having been accorded the right of oral argument before him was a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and that thereby a Federal question was presented, which, under the Constitution of the State of Missouri, required that the cause be transferred to the court en banc for reargument before the entire court. Both of these motions were denied.

The Wagner Company, then, unsuccessfully, petitioned the United States Supreme Court for a writ of certiorari, and when its petition was denied, Lyndon, through his attorneys, then started to enforce the judgment of the Circuit Court of the City of St. Louis, by causing an execution to issue against the property of the Wagner Company. Under this execution valuable property was levied upon and advertised for sale, to avoid which the Wagner Company, under protest, paid to the Sheriff of the City of St. Louis, Missouri, the sum of fifteen thousand and fifteen dollars and twenty-nine cents ($15,015.29), representing the amount of the judgment, interest and costs.

While this money was still in the hands of the Sheriff of the City of St. Louis, Missouri, the Wagner Company instituted this suit in the United States District Court, to have this fund declared a trust fund in the hands of the Sheriff, to which the Wagner Company is entitled, because wrongfully coerced from it in execution of a void judgment against the Wagner Company. It claims that the judgment obtained by Lyndon against it is void, and its enforcement constitutes a taking of its property without due process of law, and without its having received the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States. It claims that that judgment is void because:

1. There was no evidence produced in support of the claim that the Wagner Company had elected to avail itself of the license privilege, which, under the contract, it had the right to accept. The acceptance of this license privilege was a prerequisite to its becoming liable for the royalties sued for.

2. The peremptory instruction from the trial court to the jury was arbitrary and oppressive and beyond the power of the Court.

3. The refusal of the trial court to permit the jury to pass upon the principal issue in the case, namely, the question whether the Wagner Company had elected to avail itself of the license provision of the contract, was a denial to the defendant of the right to a trial by jury.

4. The judgment was rendered and affirmed without the Court, the jury or the Supreme Court having considered or determined the principal question in the case, namely, whether the defendant had elected to avail itself of the licensed privi-

lege of the contract, without which election no obligation to pay the royalties sued for could arise.

5. The participation of Judge Woodson of the Supreme Court of Missouri in the decision of the case, without the Wagner Company's having had the right of oral argument before him, was a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

6. The refusal of Division No. 1 of the Supreme Court of Missouri to transfer the cause to the court en banc for reargument, after the Wagner Company had asserted that a Federal question had been brought into the case by Judge Woodson's participation in the decision without his having been present at the oral argument, constituted a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

BRIEF AND ARGUMENT.

The petition disclosed that the defendant Mohrstadt therein is in possession of a fund of fifteen thousand dollars, which he coerced petitioner into paying by means of an execution issued upon a judgment rendered by the Circuit Court of the City of St. Louis, Missouri, in a suit brought by appellee Lyndon against the Wagner Electric Manufacturing Company. The Wagner Company claims that the judgment referred to was void for reasons hereinbefore and hereinafter stated, and that as the payment of the fifteen thousand dollars was coerced through seizure of its property under a void judgment, the taking of the fifteen thousand dollars was a wrongful act, and that the law implies a trust in appellant's favor in and to the fund so wrongfully acquired, which trust this suit seeks to establish.

That in such circumstances (assuming the judgment in question to be void), a trust is imposed upon the fund in favor of the rightful owner is made to appear by a consideration of the fundamental principles of equity jurisprudence and their application in the recorded decisions of the courts. Section 1047 of Pomeroy's Equity states the rule thus:

> "By the well-settled doctrine of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or vio-

lation of a fiduciary duty, and the like. It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit: but in many instances a resort to the equitable jurisdiction is proper and often necessary."

Section 1053 of the same treatise states it in this way:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentation, concealments, or through undue influence, or duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust upon property thus acquired in favor of the one who is truly and equitably entitled to the same; although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hand of any subsequent holder, until a purchaser for it in good faith and without notice, acquires a higher right and takes the property relieved from the trust. The forms and varieties of these trusts which are termed ex maleficio or ex delicto, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy for damages against the wrongdoer."

In 39 Cyc, page 190, we find the rule stated:

> "A constructive trust may arise where one wrongfully takes possession or assumes control of property belonging to another."

See, also, Perry on Trusts, 3d Ed., Sec. 192.

Assuming, therefore, that (as we shall attempt to point out) the judgment in question was void, and the funds in the hands of the Sheriff in reality and in good conscience belong to the Wagner Company, the next question presented is, did the District Court have jurisdiction and the power to compel a return of the money to the Wagner Company, and enjoin defendant Lyndon from receiving the benefit of his void judgment? We say that the District Court did have such jurisdiction and power. Paragraph 14 of Section 24 of the Judicial Code, the original of which was passed by Congress following the adoption of the Fourteenth Amendment, is as follows:

> Sec. 24. **(Original Jurisdiction.)** The district courts shall have original jurisdiction as follows:
>
> Fourteenth. **(Of Suits to Redress the Deprivation, Under Color of Law, of Civil Rights.)** Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The Fourteenth Amendment contained a guaranty of due process and equal protection of the law. The section above quoted was passed for the purpose of lodging in the District Court the jurisdiction to make effective the rights secured by the Fourteenth Amendment. Among these rights was the right of due process and equal protection.

Cuyahoga River Power Co. v. Akron, 240 U. S. 462;
Truax v. Raich, 239 U. S. 33;
Crane v. Johnson, 233 Fed. 334.

Assuming, therefore, that jurisdiction was properly lodged in the District Court because of the Federal question involved, the next question that presents itself is, did the District Court have the power to deprive defendant Lyndon of the benefit of a judgment which was void because lacking in due process and which deprived appellant of the equal protection of the law?

That Federal courts can, and will, deprive a plaintiff in the State courts of the benefits of a judgment, which is void because of jurisdictional defects in the process by which it was obtained, has been definitely settled by the case of Simon v. Southern Railroad Company, 236 U. S. 115.

In that case Simon obtained a judgment against the Railroad Company in Louisiana by service (under a Louisiana statute) upon the Assistant Secretary of State of Louisiana. The injury for which he sued occurred in Alabama. The Supreme Court of the United States held that the service on the Assistant Secretary of State was not valid. As to judgments in cases where

proper service is not had upon the defendant, the Supreme Court in the opinion in that case said:

> "Such judgments are not erroneous and not voidable, but, upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to plaintiff, who, if concerned in executing such judgments, is considered in law as a mere trespasser. (Citing cases.) On principle and authority, therefore, a judgment obtained in a suit of which the defendant had no notice was a nullity and the party against whom it was obtained was entitled to relief."

After pointing out that under the laws of Louisiana the Railroad Company might have filed an independent suit to set aside the judgment referred to, the opinion proceeds to say:

> "But, manifestly, if a new and independent suit could have been brought in a State court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal court, which was then bound to act within its jurisdiction and afford redress. (Citing cases.) United States courts could not stay original or supplementary proceedings in a State court (citing cases), or revise its judgment. But by virtue of their general equity jurisdiction they could enjoin a party from ENFORCING A VOID JUDGMENT."

And the Court in the Simon case, proceeding to apply the principles discussed in the opinion, enjoined Simon from enforcing the judgment, on the ground that the

judgment was void for want of notice to defendant of the pendency of the suit.

In a still more recent suit, that of Wells Fargo & Company v. Taylor, decided by the Supreme Court of the United States on December 6, 1920, and reported in January First Advance Opinions of the Supreme Court of the United States for the year 1920-21, at page 105, the Supreme Court again directed an injunction against the enforcement of a judgment. It had been obtained by Taylor against the Railroad Company in violation of an agreement Taylor had with the Wells Fargo & Company, his employer at the time of the injury. In that case Taylor had brought suit in Monroe County, Mississippi; had obtained proper service upon the Railroad Company; the Railroad Company appeared and defended; the Railroad Company attempted to avail itself of the benefits of the contract between Taylor and Wells Fargo & Comany, which exempted the Railroad Company from a suit for personal injury; the trial court had eliminated this contract as a defense, and a judgment had been entered, and an appeal had been taken to the Supreme Court of Mississippi; and the Supreme Court of Mississippi had affirmed Taylor's judgment. Notwithstanding the regularity of all the proceedings, and notwithstanding the fact that the lower court's judgment had been affirmed by the Supreme Court of Mississippi, the Supreme Court of the United States decreed that Taylor should not be permitted to enjoy the benefits of his judgment.

In that case the authorities are all reviewed, and the power of the Federal Court to prevent the execution of a judgment wrongfully obtained, was placed beyond any question.

The U. S. Circuit Court of Appeals for the 8th Circuit, dealing with the same question in a litigation between the National Bank of Commerce and Mr. H. Clay Pierce (268 Fed. 487) said:

> "The single question remains: Was the complainant's application for an interlocutory injunction to prevent the bank from collecting the judgment of $700,000, which it had obtained in the State court, until the claims of the plaintiff in this suit could be heard and determined, improvidently denied? The law intrusts the granting or refusal of temporary injunctions to the judicial equity, not of the appellate, but of the trial court. Its decision of this question, therefore, is presumptively right, and it ought not to be reversed or modified, unless it appears that it has disregarded some of the rulings or principles of equity established for its guidance or has seriously abused its discretion.
>
> "Stearns-Royer Mfg. Co. v. Brown, 114 Fed. 939, 941, 942, 52 C. C. A. 559; Stokes v. Williams, 226 Fed. 148, 156, 141 C. C. A. 146, 154. To sustain the denial of the injunction counsel for the bank invoked Section 720 of the R. S. (Compe. St. 1242), which provides that:
>
> " 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.'
>
> "But this section does not deprive the Federal courts, sitting in equity in cases involving any controversies between citizens of different states, of which such courts have jurisdiction, and which have been adjudged by the State courts, of the

power or relieve them of the duty to enjoin the parties to such suits from enforcing judgments of the State courts in their favor where, on account of fraud, mistake, accident or any other ground of equity jurisprudence, and on account of the threat of imminent and irreparable injury, the rules and principles of equity demand that the parties shall not proceed to enforce such state judgments. Marshall v. Homs, 141 U. S. 589, 596, 599, 12 Sup. Ct. 62, 35 L. Ed. 870; Simon v. Southern Ry., 236 U. S. 115, 124, 129, 35 Sup. Ct. 255, 59 L. Ed. 492; National Surety Co. v. State Bank, 120 Fed. 593, 600, 602, 56 C. C. A. 657, 61 L. R. A. 394; Schultz v. Highland Gold Mines Co. (C. C.) 158 Fed. 337, 340."

In the suit now before your Honors the petitioner invokes the application of the same principles to a different though (in legal effect) an equivalent state of facts. By reference to the pleadings and the contract set out in the opinion of the Supreme Court of Missouri attached thereto, it will be observed that the Wagner Company and the defendant Lyndon entered into a contract, by which the Wagner Electric Manufacturing Company was granted **the right to elect** between purchasing a certain patent, **or taking an exclusive license** to use, manufacture and sell the patented device. The contract provided that **if** the Wagner Company should **elect** to take an exclusive license, it should pay a certain minimum royalty. The suit by Lyndon in the Circuit Court of the City of St. Louis, Missouri, in which he obtained the judgment complained of, was for the minimum royalty specified in the contract. In that suit plaintiff's petition alleged that the Wagner Company **had elected to operate under an exclusive license.** De-

fendant denied that it had so elected. This was the main issue in the suit. The opinion of the Supreme Court of Missouri shows, and our petition alleges, that this issue was never decided. There is no pretense, and there has never been a pretense, that the evidence adduced in that suit tended to show that the Wagner Company had exercised its right of election, and had elected to operate under an exclusive license, and yet, by the pleadings in that case, and by the terms of the contract, the Wagner Company was liable to pay the royalties only IF IT ELECTED TO OPERATE UNDER A LICENSE. The petition in that case alleged:

> "That on the 2nd day of March, 1912, plaintiff and defendant entered into an agreement in writing wherein and whereby the defendant was granted and obtained THE RIGHT TO ELECT between the privilege of purchasing outright the patent hereinabove referred to, or operating thereunder under an exclusive license."

This allegation was followed by the further allegation:

> "That thereafter defendant, pursuant to the terms of said contract, ELECTED TO OPERATE UNDER AN EXCLUSIVE LICENSE," etc.

When the case came on for trial before the trial court the defendant sought, by offering an appropriate instruction, to have this question of fact decided by the jury. As stated above, and as shown by our petition herein, and as is also shown by the opinion of the Supreme Court of Missouri, no evidence had been offered to show that the Wagner Company had elected to operate under a license. On the contrary, the evidence

showed, beyond question, that the Wagner Company had never elected to operate under a license. But, in order that the points to be decided should be restricted to the issues raised by the pleadings, the defendant asked an instruction upon this question of election, which instruction the Court refused to give. And the record shows that the trial court withdrew all of the issues from the jury; that it gave a peremptory instruction to the jury to return a verdict for the amount sued for. Appellant's position here is that the trial court in so doing acted arbitrarily; that it completely ignored the petition, which was the foundation of Lyndon's suit, as though no petition had ever been filed. That while the Wagner Company had been summoned into court to answer to a charge that it had elected to operate under an exclusive license, yet, when it came into court, this charge was eliminated from the consideration of the jury, eliminated from the consideration of the Court and a judgment rendered upon the claim, MADE BY THE COURT, and never made by the plaintiff, viz.: That the Wagner Company had bound itself **absolutely** to pay the royalties in question, regardless of whether it had elected to operate under a license or not.

We claim that the Court did what it had no power to do. That its action was entirely beyond its jurisdiction.

The Wagner Company's position is that no judgment for royalties could be rendered by the Circuit Court of the City of St. Louis without that Court having first determined that the Wagner Company had elected to operate under a license; and that the Court having entered the judgment complained of, without first having

determined that the Wagner Company had elected to operate under a license, the judgment was arbitrary, a mere edict of the judge, and its enforcement constitutes the taking of plaintiff's property without due process.

The law applicable to this state of facts is best illustrated by the case of Fayerweather v. Ritch, 195 U. S. 276:

Mr. Fayerweather, a very wealthy man of New York, made a will which was violative of the statute of New York prohibiting a person from disposing of more than half of his property by will to charity. When the will came on for probate, his widow and certain heirs contested it, on the ground that it was in contravention of the statute mentioned. During the pendency of the probate proceeding, a compromise was made with the widow and contesting heirs, by which, for valuable considerations, each consented to the probate of the will, and released any claims against the trustees for the property which would have come to them but for these releases. The will was thereupon probated. Subsequently, certain colleges made beneficiaries by the will brought suit againts the trustees and against the widow and other heirs to establish their rights to certain of this property, which they claim the trustees held in trust for the plaintiffs in that suit. Mrs. Fayerweather and the other heirs who had executed the releases referred to, filed answers and counterclaims repudiating the releases, claiming that they had been procured by fraud. Upon the issues raised by the petition and the counterclaims, the case went to trial in the State courts of New York, and a judgment was entered against Mrs. Fayerweather and the heirs referred to. From this judgment appeals were taken to the general term of the Supreme Court of that State,

and from there to the Court of Apepals of New York, in both of which courts the judgment of the lower court was affirmed.

Thereupon the defeated heirs brought suit in the United States Court of New York to establish their right to the property in question, to which suit the judgment of the State court was pleaded as *res adjudicata*. This was the suit that reached the Supreme Court of the United States. In this suit the plaintiffs claim that they by proper pleading attacked the validity of the releases in question, on the ground of fraud, and that evidence had been introduced to sustain the charge of fraud, but that the trial court had not decided that particular issue, and that the courts to which appeals were taken had likewise failed to decide that issue. Upon this consideration they claimed that the judgment of the said Court was not *res adjudicata*.

Mr. Justice Brewer, who rendered the opinion of the Supreme Court, stated the contention of the parties and the conclusions of the Court as to the law applicable thereto in the following language:

> "Our jurisdiction of this direct appeal from the decision of the Circuit Court is invoked on the ground that the case involves the application of the Constitution of the United States.
>
> The contention is that, by Article V of the Amendments to the Federal Constitution, no person can 'be deprived of life, liberty or property without due process of law;' that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that they were deprived of this property by the judgment of the Circuit Court, which gave unwarranted effect to a judgment of

the State courts; that this action of the Circuit Court is not to be considered a mere error in the progress of a trial; but a deprivation of property under the forms of legal procedure. In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 51 L. Ed. 979, 17 Sup. Ct. Rep. 581, we held that a judgment of a State court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We said (p. 234 L. Ed., p. 983, Sup. Ct. Rep., p. 584):

> 'But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interetsed the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This Court, referring to the Fourteenth Amendment, has said: "Can a state make anything due process of law, which by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation."' Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. Ed. 616, 618.

The * * * same question could be propounded and the same answer should be made, in reference

to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment."

And again (p. 236, 237, L. Ed., p. 985, Sup. Ct. Rep., p. 584):

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law if the necessary result be to deprive him of his property without compensation."

"If a judgment of a State court can be reviewed by this Court on error upon the ground that although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to), a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a State court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental ques-

tion presented in the trial court of the state was the validity of those releases; that, notwithstanding this, that Court came to its conclusion and rendered its judgment without any determination thereof; that the Appellate Courts wrongfully assumed that the trial court had decided the question, and rendered their judgments on that assumption, so that the necessary result of the proceedings in the State courts was a deprivation of the right of the plaintiffs to a share of the estate without any finding of the vital fact which alone could destroy their right. The contention is not that the State courts erred in their finding in respect to this fact, but that there never was any finding. Such decision of the State courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as conclusive determination of the fact. ALTHOUGH THESE PLAINTIFFS WERE PARTIES TO THE PROCEEDINGS IN THE STATE COURTS, AND PRESENTED THEIR CLAIM OF RIGHT, IF IT BE TRUE THAT THE NECESSARY RESULT OF THE COURSE OF PROCEDURE IN THOSE COURTS WAS A DENIAL OF THEIR RIGHTS—A TAKING AWAY AND DEPRIVING THEM OF THEIR PROPERTY WITHOUT ANY JUDICIAL DETERMINATION OF THE FACT UPON WHICH ALONE SUCH DEPRIVATION COULD BE JUSTIFIED—A CASE IS PRESENTED COMING DIRECTLY WITHIN THE DECISION IN 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581. Giving effect in the Circuit Court to the State judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully

obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the State proceedings can be sustained or not is a question upon the merits, and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of the wrongful character of the proceedings in the State courts and the necessary result therefrom. We are of opinion that the jurisdiction of this Court must be sustained."

Your Honors will note and appreciate the significance of the conclusion of the Court, quoted above, in the following language:

> "Although these plaintiffs were parties to the proceedings in the State courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights —a taking away and depriving them of their property **WITHOUT ANY JUDICIAL DETERMINATION OF THE FACT UPON WHICH ALONE SUCH DEPRIVATION COULD BE JUSTIFIED**—a case is presented coming directly within the decision in 166 U. S. 226."

That part of the opinion just quoted is directly applicable to the judgment complained of in this suit.

As we have pointed out in this brief, the St. Louis Circuit Court arbitrarily directed a verdict to be returned against the plaintiff in this case for the royalties claimed, without either the Court or the jury having

determined that the Wagner Company had elected to operate under a license. Until and unless the Wagner Company elected to operate under a license no right to royalties accrued. This was the fundamental issue in the suit. Our petition here alleges that there was no evidence of an election, and that the Court did not in any manner determine that there had been an election. The statement of the case, and the review of the evidence, as they appear in the opinion of the Supreme Court of Missouri, which affirms the judgment, sustain completely the allegation of our petition, that this question of election was never decided.

Such being the facts, the resulting judgment comes within the condemnation of the Supreme Court of the United States, as expressed in the above quotation, where it is said that a judgment rendered "without any judicial determination of the fact upon which alone" it could be sustained, is a deprivation and taking of property without due process of law.

The same doctrine was invoked and approved by the Supreme Court of Illinois, in the case of Hultberg v. Anderson, 252 Ill. 607.

This was a suit brought to annul a prior decree between the same parties. In that case the Supreme Court of Illinois said:

> "Plaintiffs in error do not contend that there was a want of jurisdiction of the person of Anderson in the proceeding wherein he was adjudged to pay $232,200 to Hultberg, but their contention is that there is another class of judgments which may be wanting in due process of law, notwithstanding the Court rendering such judgment has complete jurisdiction both of the subject matter and of the

person of the parties concerned, and that the case at bar belongs to that class.

Under the due process clause of the Constitution a party is not only entitled to notice of the proceedings against him, but he is also entitled to be heard in his defense. Of what avail is it to summon a party into court if after he appears the Court arbitrarily refuses to hear him? A JUDGMENT PRONOUNCED WITHOUT ANY JUDICIAL DETERMINATION OF THE FACTS WHICH ALONE CAN SUPPORT SUCH JUDGMENT IS MERELY THE ARBITRARY EDICT OF THE JUDGE, AND IS AS MUCH WANTING IN DUE PROCESS OF LAW AS THOUGH THE PARTY AGAINST WHOM IT IS ENTERED HAD RECEIVED NO LEGAL SUMMONS.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Fayerweather v. Ritch, 195 U. S. 276."

In an earlier case, that of Windsor v. McVeigh, 93 U. S. 274, the Supreme Court had occasion to point out the limitations upon the power of a Court, and to emphasize the fundamental principles, that when a Court exceeds its powers, it then acts without or beyond its jurisdiction, and its action is void.

That case was an action in ejectment to recover certain real estate in Alexandria, Virginia. Suit was brought in the State Court, and from there taken to the Supreme Court of the United States. The plaintiff was entitled to recover, unless his title was destroyed by a judgment in condemnation brought to confiscate his property, because of the fact he held a position of honor and profit under the Confederate government. The

defendant's title was founded upon a sale under this judgment of condemnation. The condemnation proceedings had been brought by the United States, and due notice was had by publication. In response to the notice plaintiff appeared by counsel and filed an answer which answer was, upon motion of the United States, stricken from the files, because of the fact that at the time of its filing the plaintiff was in the service of the Confederacy, and in the Confederate lines. The Court then proceeded to judgment, condemned the property and had it sold.

The Supreme Court in this situation held that the judgment of condemnation was a nullity. The Court saying that the refusal of the condemning Court to permit the defendant to answer after having been notified, was in effect a withdrawal of the notice as to him, and in consequence was equivalent to one without notice at all. To the contention made by the Government that as the Court had jurisdiction of the party and of the res, and that consequently its action in striking the answer from the files was merely erroneous, the Court said:

> "The doctrine invoked by counsel, that, where a Court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is, undoubtedly, correct as a general proposition; but, like all general propositions, is subject to many qualifications in its application. All Courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to

transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments.

Norton v. Meader, 4 Sawy. 603, Circuit Court of California.

Though the Court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the Court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the Court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the Court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the Court in rendering them would transcend the limits of its authority in those cases."

And again the Court said:

"So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the Court, without the intervention

of a jury, would be invalid for any purpose. The decree of a Court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceedings of the Chancellor. And the reason is that Courts are not authorized to exercise their power in that way."

The application of these principles to the case in hand will be seen, when your Honors keep in mind these facts as alleged in our petition:

1. The St. Louis Circuit Court proceeded to fix a liability on the plaintiff in this case, without having determined that the Wagner Company had elected to operate under a license.

2. There was no evidence whatever that the Wagner Company had so elected, which election was a prerequisite to its liability to pay royalties.

3. The St. Louis Circuit Court, by its peremptory instruction to the jury, which is set out in our petition, declared that the Wagner Company was bound absolutely to pay the royalties—that is, that its liability was not dependent upon its having elected to operate under a license.

4. In so deciding the St. Louis Circuit Court determined an issue, and predicated its judgment upon a finding which was not embraced in any issue made by the litigants in that case. In other words, the plaintiff in that case had not claimed that the Wagner Company had itself bound absolutely to pay these royalties, but had claimed that the Wagner Company had been granted a right of election and had elected to operate under a license, and had thereby become bound to pay the royalties.

We assert that the law is, that the parties are bound by their pleadings. We assert, too, that a court can only try the issues made by the pleadings. We assert, also, that when a court attempts to decide something not made an issue by the pleadings, it exceeds its jurisdiction. This is pointed out in Windsor v. McVeigh, above quoted. It is also pointed out by Judge Trieber in U. S. v. Goldsmith, 271 Fed. 845. If, as is alleged in our petition, the Wagner Company in that case was summoned into court to meet the charge that it made a contract giving it the right to elect to operate under a license, a further charge that it had exercised its option and had elected to operate under a license, and thereby had become bound for the royalties, it was entirely beyond the jurisdiction of the trial court to adjudge that it had entered into a contract, not described in the petition, under which it became bound absolutely (the language of the Court's instruction) to pay the royalties, regardless of the fact of election. No such claim as this had been made in Lyndon's petition. There was nothing in any of the pleadings to advise the Wagner Company of such a claim. There was nothing in the pleadings upon which such a claim could be submitted to the Court, and the Court had no more power to decide such a question than it would have had to adjudge the Wagner Company liable for the purchase price of this patent, without the plaintiff having claimed that the Wagner Company had agreed to purchase the patent.

When the Court departed from the pleadings, and founded its judgment upon a claim not embraced within the pleadings, its action was, in the eyes of the law, arbitrary. And the arbitrary character of this judgment is emphasized when your Honors consider that

there was nothing in the contract justifying such a view; that there was no evidence that the Wagner Company had ever elected to operate under a license, but that, on the contrary, the Wagner Company had never made or sold a machine (covered by the patent), and had never elected, either to purchase the patent or to operate under a license from the patentee.

In this state of facts, the language of the Supreme Court of the United States, in Interstate Commerce Commission v. L. & N. R. R., 227 U. S. 88, is pertinent.

In that case the Court had under consideration the validity of an order of the Interstate Commerce Commission fixing rates. The Court said:

> "On the appeal here, the Government insisted that while the Act of 1887 to regulate commerce made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn Act of 1906, that rates should be set aside if, after a hearing, the 'Commission should be of the opinion that the charge was unreasonable.' In such case it insisted that the order based on such opinion is conclusive and (though Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.
>
> 1. But the statutes gave a right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. **A finding without evidence is arbitrary and baseless. And if the Government's contention is cor-**

> rect it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission would disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however beneficiently, exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary execution of power."

In Hutts v. Martin, 134 Ind. 587, the Supreme Court of Indiana said:

> "It is a general principle of law that courts have no power to adjudicate matters not involved in the issues in causes pending before them. Litigants do not place themselves for all purposes under the control of the Court, and it is only the interests involved in the particular suit that can be affected by the adjudication. OVER OTHER MATTERS THE COURT HAS NO JURISDICTION, AND ANY DECREE OR JUDGMENT RELATING TO THEM IS VOID."

In Munday v. Vail, 34 N. J. Law 418, the Supreme Court of New Jersey said:

> "The inquiry is, had the Court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the Court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties

must be present; and, third, the point decided must be, in substance and effect, within the issue. That a Court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration, and yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a Court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the Court, and it is only over these particular interests which they choose to draw in question, that a power of judicial decision arises."

And again:

"A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard."

The decisions referred to emphasize the rule that courts, as well as every other human institution, are limited in their powers. As pointed out in Windsor v. McVeigh, courts cannot act without written pleadings. Written pleadings are necessary to the jurisdiction of the Court. It is pointed out in the opinion in that case that if a Court undertook to render a judgment upon

oral pleadings, its judgment would be void, because beyond the jurisdiction of the Court. From this it follows that the judgment must be based upon the pleadings, and cannot go beyond them. To illustrate this rule, the Court points out that in a suit on a promissory note the Court could not enter a judgment for the possession of real estate. And it is perfectly plain that upon a charge of burglary a man could not be convicted for manslaughter. These are extreme illustrations, but they serve to make clear to the mind the proposition that a Court is constituted only to decide the particular complaint that is lodged with it. It has no jurisdiction or authority to decide any other. In this case the particular complaint was that the Wagner Company, by a contract, had been granted a right to elect to operate under a license, in which event it obligated itself to pay certain royalties. The particular complaint of this case further was, that it had elected to exercise its right of election, and had become bound to pay these royalties. When the evidence was introduced, there was no evidence to sustain the particular complaint, that it had exercised the right of election. On the contrary, the evidence clearly showed that no such election had been made. The St. Louis Circuit Court thereupon disregarded the complaint upon which its judgment had been invoked, and, having the parties before it, arbitrarily instructed the jury that the Wagner Company had made a contract, under which its obligation to pay the royalties was absolute, and required the jury to return a verdict for the full amount claimed. This, we say, upon the authority of the cases above referred to, was arbitrary, and beyond the power of the Court, and the resulting judgment was a nullity.

It was a nullity for other reasons. It was a nullity because, as we have pointed out, there was no evidence whatsoever, or pretense of any evidence that the Wagner Company had elected to avail itself of the license privilege of the contract. The burden was upon Lyndon to produce evidence of his claim set up in his petition, that the Wagner Company had elected to avail itself of the license privilege of the contract. He wholly failed to sustain this burden. On the contrary, the evidence showed that the Wagner Company had not elected to operate under a license.

Now it is fundamental that (absent default of a defendant) no judgment can be entered by a court without evidence to sustain it. As stated by the Supreme Court of the United States in Interstate Commerce v. L. & N. R. R., 227 U. S. 88, quoted above:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that, where rights depend upon facts, the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The judgment was a nullity for still another reason, namely, because by the Court's action in giving a peremptory instruction the defendant in that suit was

deprived of its right to a trial by jury upon an allegation of fact which it disputed. Lyndon in his petition had alleged that the Wagner Company had elected to operate under the license provision of the contract. The Wagner Company denied this allegation. Here was an issue of fact. The result depended upon the decision of this issue. Upon this issue of fact the defendant had a right to the verdict of a jury. Now, conceding that there are circumstances under which an instructed verdict may be rendered, certainly this is a case where it was beyond the power of the Court to direct a verdict. Here the question was: Had the Wagner Company elected to operate under the exclusive license provision of the contract? That was a question of fact. The Wagner Company denied that it had so elected. The plaintiff had not only failed to produce any evidence of such an election, but, on the contrary, the only witness that the Wagner Company had, testified positively and unequivocably that it had not so elected. In this situation the Wagner Company had the right, if it chose, to have a jury pass upon that question of fact. It was beyond the power of the Court to take that right away from the Wagner Company. The right of trial by jury is preserved both by the Constitution of the United States and by the Constitution of the State of Missouri. Such being the fact, there can be no "due process" and no "equal protection of the law" in a case where the unsuccessful litigant is deprived of the right to have a jury pass upon a disputed question of fact which is vital to the renditio nof a judgment in the case.

The Missouri constitutional provision referred to is to be found in Section 28 of Article II, and is as follows:

"The right of trial by jury as heretofore enjoyed shall remain inviolate."

In giving effect to this constitutional provision the Missouri Appellate Courts have said:

"Ordinarily, where plaintiff produces parol evidence to support his action, the issue of fact should be submitted to the jury. The evidence may be all one way, yet it is for the jury to say whether they believe the witness or not." Mineral Land Co. v. Ross, 135 Mo. 101, *l. c.* 107.

In Staehlin v. Major, 199 S. W. 427, the St. Louis Court of Appeals, in treating of a case where a peremptory instruction had been given, said:

"But it is earnestly contended that the Court committed reversible error in peremptorily directing a verdict for plaintiff, and we regard it as quite clear that this contention must be upheld. The allegations of the petition were denied by the answer, and the burden of proof rested upon plaintiff, who, to make out his case, relied upon oral testimony not admitted to be true. That under such circumstances **a trial court is without power** to peremptorily direct a verdict in favor of the party having the burden of proof, is a rule of decision firmly established in this State. Such has been the law of this State since the decision of the Supreme Court in the early case of Bryan v. Wear *et al.*, 4 Mo. 106. It is unnecessary to collate all of the many later cases which are to this effect.

* * *

The credibility of the witnesses, and the weight to be given to their testimony is, in the first in-

> stance, exclusively for the jury. The Court cannot require the jury to believe the witnesses although no countervailing testimony be offered. And under such circumstances as are here presented, the giving of a peremptory instruction to find for the plaintiff is an **invasion of the province of the jury, and constitutes a denial of the right to a trial by jury.**"

In an earlier case, that of Troll v. Home Circle, 161 Mo. App., at page 722, the same Court had said:

> "Now, under the practice in this State **it is beyond the power** of a trial court to direct a verdict in favor of the party having the burden of proof where, as here, the issue of fact is controverted and oral testimony, not admitted to be true, must be relied on in proof thereof. Such a direction under these circumstances is an invasion of the province of the jury and a denial of the right to a trial by jury."

The foregoing excerpts correctly represent the state of the law in Missouri. The rule announced by them must be and is, due process in the administration of justice in the courts of that State. That rule is enforced by the constitutional provision quoted. The rule must be applicable to all litigants. To deny the benefits of that rule to one litigant is, as to him, a denial of due process and a denial of the equal protection of the law. It is an invasion of the fundamental right of trial by jury. It is an act beyond the power of the Court, and as the judgment derives its only force and effect through the arbitrary action of the Court, in directing the jury to return the verdict upon which it

is based, the judgment is void—void because founded upon an act which was beyond the power of the Court.

With respect to this right of trial by jury, the Supreme Court of the United States in Hodges v. Easton, 106 U. S. 408, has impressively said:

> "It has been often said by this Court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."

In 24 Cyc. 174 the import of the decisions upon this subject is thus stated:

> "The right of trial by jury is one which should be carefully guarded against infringement; and the constitutional provisions are uniformly construed to the effect that it cannot be denied in cases where it existed at the time of the adoption of the Constitution or in similar classes of cases arising under statutes subsequently enacted; nor can the exercise of the right be made subject to such conditions and restrictions as unreasonably to impair it."

And we say to your Honors that this invalidity of the judgment was in no wise mitigated by the subsequent action of the Supreme Court of Missouri.

The Supreme Court of Missouri has two divisions. Under the Constitution of Missouri each division sits separately for a hearing of all cases taken to that court on appeal. Division No. 1 has four judges, and Division No. 2 has three judges. If upon a hearing before a division any one judge dissents from a judgment of

his division, the case, under the Missouri Constitution, is automatcally transferred to the Court en banc.

When this case came on for hearing in Division No. 1, at which hearing the oral arguments were made, Judge Woodson, who was a member of that division, was absent. Subsequently Judge Woodson wrote the opinion of the court and participated in the decision, although he had not been present at the hearing of the case.

The plaintiff's petition shows that never before in the history of the court had a judge of that court participated in a decision without having been present at the hearing.

Our contention is that we had a right to a hearing before Judge Woodson; that by his participating in the decision without having been present at the hearing, we have been denied the equal protection of the laws and due process of law.

We claim that we have bene denied the equal protection of the law, because as to all other litigants, the right of an oral hearing before all who participate in the decision has always been recognized.

We claim that we have been denied due process of law, because a hearing, or an opportunity for a hearing, is a requisite of due process.

We submit that the right to be heard before judgment is a fundamental principle of the laws of the English speaking people. It is a right not specifically mentioned in the Constitution of the United States or the Constitution of the State of Missouri. But it is a right of so ancient and universal recognition that it must be accepted as a necessary element of due process.

A trial or a hearing in English jurisprudence contemplates the presence of the parties in person or by representative, and an oral presentation of facts and arguments. The oral presentation may be waived, but historically speaking, the right to it has never been denied—at least without rebuke from the courts of last resort.

The Courts have repeatedly held that "due process" necessarily includes reasonable notice of the institution of judicial proceedings, and a reasonable opportunity to be heard. Thus in

L. & N. Ry. Co. v. Schmidt, 177 U. S. 238

the Supreme Court of the United States, in speaking of the Fourteenth Amendment, said:

> "All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

And in

Simon v. Craft, 182 U. S. 436

the same Court said:

> "The essential elements of due process of law are notice and opportunity to defend."

And in

Turpin v. Lemon, 187 U. S. 51,

the United States Supreme Court quotes from Justice Field's opinion in the case of Hager v. Reclaimant Dis-

trict, 111 U. S. 701, where he said, speaking of the Fourteenth Amendment:

> "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; **and wherever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought.** The clause in question means, therefore, that there can be no proceedings against life, liberty or property which may result in the deprivation of either, without observance of those general rules established in our system of jurisprudence for the security of private rights."

The term "due process" (as guaranteed by the Fourteenth Amendment) has no statutory or constitutional definition. Its meaning has to be arrived at through consideration of the historical development of our jurisprudence, and the political and ethical conceptions of the English speaking peoples.

Thus viewed one cannot escape the conviction that there is no right more jealously guarded by our laws, more firmly imbedded in our system of political rights than the right to a hearing before judgment. And the right to be heard, as stated before, includes the right to personal presence and oral presentation.

Can your Honors conceive of a defendant being deprived of his liberty or his life, without first being accorded the right of oral argument before a jury? A

denial of such a right would be a denial of due process. Many Courts have so held.

In the case of Douglas v. Hill, 29 Kans., *l. c.* 528, the Supreme Court of that State announced its conclusions in the following language:

> "A party to a lawsuit has a right to be heard, not merely in the testimony of his witness, but also in the arguments of his counsel. It matters not how weak and inconclusive his testimony may be, if it is enough to present a disputed question of facts upon which he is entitled to a verdict of the jury, he has a right to present in the arguments of his counsel his views of the case. This is no matter of discretion on the part of the Court but an absolute right of the party. * * * Limiting the time of an argument and refusing to permit any argument at all are entirely different matters. The one is the exercise of a discretion, the other is a denial of a right."

The same rule of law has been applied to hearings before appellant tribunals. This is illustrated by the case of

Devoit v. McGerr, 14 Colo. 577.

That was a case which involved the validity of a decision rendered by commissioners appointed to assist the Supreme Court in its work. The oral argument of that particular case had been before the commissioners and not before the Court. In disposing of the case the Court said:

> "It is proper, therefore, to state that this Court is now and always has been, of the opinion that

it cannot discharge its constitutional obligations to litigants by the promulgation of any opinion, by whomsoever prepared, without first being satisfied of the correctness of the opinion in all substantial particulars; and also that the privileges of being heard orally before the Court prior to final judgment is a right which, though subject to reasonable regulation by the Court, cannot justly be denied to any party litigant making reasonable application therefor. 'Hear before you strike' was a maxim of the ancient jurists."

In 2 Ruling Case Law, p. 172, it is said:

"The parties, as a matter of right, are usually entitled to a personal hearing for the argument of the case when proper request is made therefor, but the exercise of this privilege is subject to reasonable regulations by the Appellate Court, and, like any other privilege, may be waived."

And again:

"While argument of the case in the first instance on appeal is a matter of right, re-arguments are directed for the satisfaction of the Court alone, and are altogether subject to its discretionary control and direction."

The Supreme Court of Massachusetts, in the case of Wall v. Old Colony Trust Co., 177 Mass., *l. c.* 277-278, used the following language:

"But the case presents no question of this kind, for this Court never has attempted to deprive anyone of the right or privilege of arguing orally.

> Not only are oral arguments always heard before a quorum of the Court, unless such arguments are expressly waived, BUT COUNSEL MAY, IF THEY CHOOSE, SECURE A RIGHT TO BE HEARD ORALLY BEFORE ALL THE JUSTICES WHO PARTICIPATE IN THE JUDGMENT, if for any reason it becomes necessary, as it sometimes does, for other justices to be called in in order that the judgment may be concurred in by a majority of the whole Court."

And in California it has been recognized that counsel should have an opportunity to orally present his case to each judge who participates in the decision; in the case of Fair v. Angus, 57 Pacific 385, holding that where a judge has not heard the argument AND IT IS DEEMED IMPORTANT THAT ALL THE JUDGES SHOULD PARTICIPATE IN THE DECISION, the submission of the appeal will be set aside, with leave to counsel to stipulate to re-submit the case on the briefs and printed arguments already on file.

While in the opinion of the Massachusetts Court just quoted, the Court did not say that oral argument of a cause in that court is a RIGHT protected by the Constitution, yet, nevertheless, by saying that the Court has NEVER attempted to deprive anyone of such right, it recognized oral argument as invariably a part of prescribed appellate practice in that State, which, in effect, would make it an element of due process under the laws of that State.

By Section I of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri (refer-

ring to the two divisions of the Supreme Court), it was provided:

> "The divisions shall sit separately for the HEARING and disposition of causes and matters pertaining thereto."

Here is an express constitutional recognition of the right to a HEARING, and, we assert with confidence the word HEARING as thus used, means an oral hearing; that there would be no occasion for the division to "sit separately" if causes were to be disposed of upon printed briefs and arguments.

And again, the right to an oral argument before the Supreme Court of Missouri is recognized and provided for by Rule 29 of that Court (to be found on the back of the current reports of the Supreme Court of Missouri), which is as follows:

> "Rule 29. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceeding, and fifty minutes for respondent or defendant in error, or respondent in original proceeding."

So here we have a constitutional recognition of the right to oral argument, made effective by rule of the Court. And—if oral argument is a right—then it is a right to be heard by all the judges who participate in the decision. If it is a RIGHT, it has a REASON behind it. The REASON is to be found in the consideration that the litigant may, by oral argument, more adequately inform the judges who are to decide his case, of the matters and things to be considered in reaching a decision. This reason is just as potent with respect to

one judge as it is to the other three judges. If (as certainly is contemplated) the opinion and judgment of three of the judges may be influenced by an informative and persuasive presentation, so likewise may the opinion of the fourth judge be also influenced.

And, aside from the theoretical aspects of the determination of questions of law and fact by appellate courts, we know, from experience, that in many cases the judges do not agree among themeslves in the initial stages of reaching a judgment, and that one judge has an influence upon the views and conclusions of the other judges.

And, as the Courts have regard for the substance and realities of things, as distinguished from mere forms and abstractions, the right of the litigant to the opportunity to rightly influence the opinion of each and every judge who participates in the decision, should be scrupulously protected and enforced.

This is of peculiar importance under the Constitution of the State of Missouri, for by Section 4 of the Amendment of 1890 to the Constitution of Missouri, it is provided as follows:

> "Section 4. Cause transferred to court en banc —when—When the judges of a division are equally divided in opinion in a cause, or WHEN A JUDGE OF A DIVISION DISSENTS FROM AN OPINION THEREIN * * * the cause, on the application of the losing party shall be transferred to the Court for its decision."

Under this provision of our Constitution, therefore, if Judge Woodson, who wrote the opinion in this case,

had reached a contrary conclusion, petitioner would have had the RIGHT to have the case transferred to the Court en banc and a hearing had therein on the entire case. And who can say that if Judge Woodson had heard the oral argument of this case, he would not have reached a different conclusion from that disclosed by his official opinion.

The case of Shaw v. People, 3 Hun. (N. Y.) 281, gives emphasis to the obvious answer to this question.

In the State of New York there is a statute which provides:

> "How can any judge decide or take part in the decision of any question which shall have been argued in the court when he was not present and sitting therein as a judge."

(And in passing, it may be said that the statute referred to is but an expression of the fundamental principles which we claim are inherent to our jurisprudence.)

In the case last referred to, the Court was called upon to consider the effect of the temporary absence of one of the judges of one of the New York courts during the progress of a trial. The court was composed of four judges. On one of the days of the trial, one of the judges absented himself. He returned the next day and continued to participate in the trial. The Court said:

> "Certainly their (the three judges who were present all the time) understanding and intellects were better prepared by reason of having heard the whole evidence, than was Steere's who had not

heard the evidence taken on Monday when he was absent from the court house. His vote and voice upon any question arising upon the trial after his return, may have produced a different result from what they would, had he remained during the whole trial, heard the whole evidence, and given his reflective judgment to it, prefatory to voting and speaking in the deliberations which ensued after his return to the bench, which he had, so far as the facts of the trial which took place on Monday, vacated and abandoned. It is not for us to speculate, in a case where the life of a prisoner is involved, as to the extent of the influence of the vote and voice of one who has not heard the whole evidence. The prisoner is entitled to the full benefit of the understanding and judgment of those who take part in the judicial deliberation which affects his life. He is entitled to all the forms of law, to all the provisions of the Constitution by which his rights are secured."

It is not impossible that Judge Woodson's opinion in the present case might have been influenced by the oral argument and presentation of this case. If he had reached a differtnt conclusion, it is not impossible that his views would have had an influence on the opinions of the other judges. It is evident that he took a leading part in the decision of this case, for to him was delegated the duty of investigating the record and writing the opinion of the Court. Your Honors know how important in the decision of a cause, is the opinion of the judge to whom is assigned the task of examining the record and writing the opinion of the court. Your honor may know that in many in-

stances the other judges do not examine the records and the qutstions involved with the same care and sense of responsibility that is exercised by the judge to whom the assignment is made.

At any rate, under the provision of the Constitution of the State of Missouri above quoted, it is clear that if Judge Woodson had reached a contrary conclusion, the result would have been a transfer of this cause to the court en banc for a hearing before the whole court, and a decision of the case by seven judges instead of four.

There is another consideration here to be taken into account. Insofar as we have been able to investigate, we have been unable to find that ever before in the history of the Supreme Court of Missouri, has a judge participated in the decision of a cause unless he was present at the oral argument. An examination of the reports discloses innumerable instances where, for various reasons, individual judges are marked as "not sitting." They may be absent because disqualified, or from reasons of convenience or necessity. But when they are absent, the record invariably discloses that they do not participate. The present case, so far as we have been able to ascertain, is the only case in the history of Missouri where a judge who was not present at the oral argument had participated in the decision and written the opinion of the Court.

Assuming this to be a fact, we then submit that by the action of the Court in this case, we have been deprived of a right which has uniformly been accorded to all other litigants—that is, the right to an oral argument before all the judges who participate in the deci-

sion. And in being thus discriminated against we have been denied the equal protection of the law, guaranteed by the 14th Amendment.

The answer to our complaint about the participation of Judge Woodson, without having, as to him, been accorded the right of oral argument, must be found largely in the fundamental conception upon which the judicial systems of the English speaking peoples are founded. There is implanted in that race, and, indeed, in all races, intuitive thought, that a man has not been given a square deal unless he has been given full opportunity to be heard. In response to this intuitive thought, those who have been able to control the jurisprudence of the English speaking peoples have jealously guarded and assured the right to a hearing. The full right to a hearing has thus become implanted as one of the sacred ingredients of "due process" and "equal protection of the laws."

The guaranty of due process and the equal protection of the laws has been written into the Constitution of the United States. The State Courts, inadvertently, have at times denied to litigants the rights guaranteed by the Constitution of the United States. When this occurs, and when the Courts of the United States—that is, the Federal Courts—are applied to, they, as the repositories of the judicial power of the Federal Government, are under a sacred duty to see that the constitutional guaranty of due process is made effective. They should exercise their power to protect these fundamental rights without timidity, for it is of vastly more importance that the fundamental guarantees of the Constitution of the United States should be clearly and firmly established and maintained, than the State

Courts should be absolved from implied criticism. If these fundamental guarantees are to be made of value in the life of the individual and of the nation, they must be clearly defined and at all times available, and not obscured by invocation of doubtful distinctions and exceptions.

With respect to our contention that Judge Woodson's participation in this decision, under the circumstances described, constituted a denial of due process and a denial of the equal protection of the laws, we have to admit there are not many available decisions; but with respect to our contention that the initial decision of the trial court was invalid, because rendered without a determination of the point, without which no liability could be imposed upon the Wagner Company (to-wit, its election to take a license from Lyndon), we assert with confidence that under the decision of the Supreme Court of the United States, in the Fayerweather will case, and the principles of law there announced, that there can be but one answer, and that is, that our contention in this respect is well founded.

Both the District Court and the United States Circuit Court of Appeals failed to apply the principles which are treated of in the foregoing argument. With respect to our contention that the State Court exceeded its power, when it refused to determine, or to permit the jury to determine, the one question of fact upon which alone the judgment, under the pleadings, had to depend, both the District Court and the Court of Appeals were of the opinion that such failure was mere error, to be corrected only upon appeal to the State Supreme Court.

Our answer now, and our claim always has been, that what the State Court did was beyond its power or jurisdiction, and that when a Court exceeds its jurisdiction and power its act is a nullity. It is not error. The act becomes a nullity when it exceeds the power of the Court performing it. The judgment becomes a nullity, because the Court had no power to enter such a judgment in the case then pending before it. When it did so, and attempted to take petitioner's property through the power of an execution, founded on a void judgment, such taking became a taking without due process of law.

We, therefore, earnestly pray that the writ of certiorari may be awarded, so that the questions involved may come before this Court either on the appeal which has been heretofore prosecuted, or by certiorari, as the Court may determine is the proper remedy.

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